

HZHS

a

v.

DGIR

HIGH COURT BORNEO, KUCHING

HAIDAR MOHD. NOOR J

[ORIGINATING MOTION NO. KG. 18 OF 1990]

b

14 DECEMBER 1990

ADMINISTRATIVE LAW: *Judicial review - Mandamus and certiorari - Circumstances under which certiorari will issue - Frivolous or vexatious - Discretion of Court - Lack of jurisdiction - Failure to perform statutory duty - Breach of natural justice.*

REVENUE LAW: *Assessment for additional tax - Fair and proper estimate - Local knowledge - Honest guess work - Onus on assessee to provide documentary evidence - Income Tax Act 1967, s. 91(1), Schedule 5, para. 13.*

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On 14 August 1990, the respondent (DGIR) assessed the applicant Z for additional tax. Z has appealed to the Special Commissioner of Income Tax (SCIT) against this assessment. In these proceedings, Z, by way of *ex-parte* originating motion under O. 53 r. 1 of the Rules of the High Court 1980 (RHC), is seeking leave of the Court for the orders of:

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- (a) *certiorari* to quash the additional assessment and
- (b) *mandamus* to the DGIR to consider all the facts and documents presented by Z and to determine the additional assessments according to the provisions of the Income Tax Act 1967 (the Act)

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Z claims that there has been a breach of natural justice by DGIR and that the DGIR had misdirected himself and failed in his duties under the Act.

Z also argues that he was not obliged to have exhausted his right of appeal within the administrative hierarchy nor need he have exhausted his right of appeal to a Court of law in seeking an order of *certiorari*.

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Held:

[1] In an application for leave for an order of *certiorari*, the guiding principles are firstly that the applicant must show *prima facie* that the application is not frivolous or vexatious and secondly that there is some substance in the grounds supporting the application.

[2] The facts that Z's tax agents had meeting from exchanged correspondence with officers from the DGIR prove that Z was given all the opportunities to present his case; as such there is no evidence of the breach of the rules of nature justice.

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[3] (a) Under s. 91(1) of the Act, the DGIR has the power to make an assessment or additional assessment according to the best of his judgment. It is up to Z to provide the documentary evidence for the consideration and the best judgment of Z. The DGIR must take into consideration local knowledge and repute in regard to the assessee's circumstances and all other matters which he think will assist him in arriving at a fair and proper estimate, including some honest guess work;

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- (b) If there are merits in Z's case and the DGIR has erred in making the additional assessment, the true amount should be determined on appeal and under para. 13 of schedule 5 to the Act, the onus of proving to the SCIT that the additional assessments are excessive or erroneous lies on Z.

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- a** [4] (a) Where there is an appeal provision available to the applicant, *certiorari* should not normally issue unless there is shown a clear lack of jurisdiction or blatant failure to perform some statutory duty or in appropriate cases, where a serious breach of natural justice has occurred;
- (b) Based on evidence, Z has not proven any of the factors in (a) above to merit the Court exercising its discretion by granting the leave sought.

b [Z's application dismissed.]

Cases referred to:

Anisminic v. Foreign Compensation Commission [1969] 2 AC 147

Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 1 CLJ (Rep) 33

- c** *Commissioners of Income Tax, Central & United Province v. Laxminarain Badridas* [1937] 5 ATR 170

Government of Malaysia & Anor. v. Jagdis Singh [1987] CLJ (Rep) 110

Lai Cheng Cheong v. Sowaratnam [1983] CLJ (Rep) 216

Legislation referred to:

Income Tax Act 1967, s. 91(1)

- d** Rules of the High Court 1980, O. 53 r. 1

For the Applicant - Alvin Chong (Stella Chin with him); M/s. Goh & Partners

For the Respondent - Zaleha Zahari FC

JUDGMENT

Haidar Mohd. Noor J

- e** The applicant, Z filed *ex-parte* originating motion under O. 53 r. 1 of the Rules of the High Court 1980 (RHC) seeking leaving of the Court to apply, *inter alia*, for the following orders:

1. An order of *certiorari* to remove into this Court for the purpose of it being quashed additional assessments dated the 14 August 1990 raised on the applicant by the respondent;

- f** 2. An order of *mandamus* directed to the Director General of Inland Revenue to consider all the facts and documents presented to him by the applicant and determine the additional assessments according to the provisions of Income Tax Act 1967;

3. An order that all proceedings in respect of the additional assessments dated 14 August 1990 raised on the applicant be stayed.

- g** The statement pursuant to O. 53 r.1(2) of the RHC together with the affidavit of the applicant were filed in support of the originating motion. A supplementary affidavit of the applicant was filed on 30 November 1990 (encl. 11). After hearing submissions of the learned Counsels for the both parties on 14 December 1990 I dismissed the application for leave with costs to be taxed unless agreed. The applicant appealed against my said order.

- h** The concise grounds in which the said relief is sought is as follows:

- (i) The assessments were made and conducted in manner contrary to natural justice.
(ii) The assessments were raised contrary to the provisions of the Income Tax Act 1967.
(iii) The respondent did not examine the facts before him .

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- (iv) The respondent had misdirected himself on the provisions of the Income Tax 1967. *a*
- (v) The respondent had blatantly failed in his duties under the Income Tax 1967.
- (vi) In arriving at the assessments, the respondent had failed to take into account relevant matters which he ought to have taken into account, namely -
 - (a) the applicant was holding certain joint account as a trustee for the political party, Parti Pesaka Bumiputra Bersatu (PBB) and not as his personal fund; *b*
 - (b) the applicant was holding certain investments as nominee for Parti Bumiputra Bersatu and not as his personal investments;
 - (c) explanations and particulars given by the applicant in respect of various items in the capital statement; *c*
 - (d) documentation provided by the applicant in respect of various queries of the respondent;
 - (vii) the assessments were made in an irrational and unreasonable manner and are contrary to law.
 - (viii) the respondent has given no grounds for rejecting the particulars given by the applicant. *d*

It is not disputed, as submitted by the learned Senior Federal Counsel, that there is an appeal filed by the applicant and pending before the Special Commissioners of Income Tax in respect of the additional tax imposed on him.

The guiding principles for an application for leave for an order of *certiorari* are clearly set out by the Supreme Court in *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 1 CLJ (Rep) 33 at p. 35 as follows: *e*

The guiding principles ought to be that the applicants must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the applicant. *f*

I therefore need to consider the grounds relied on in the application for leave, that is whether *prima facie*, the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. The grounds can broadly be stated as follows:

- (a) breach of the rule of natural justice by the respondent.
- (b) the respondent misdirected himself/failed in his duties on the provisions of the Income Tax 1967. *g*

As to ground (a) above, para. 4 of the affidavit of the applicant himself would seem to show to the contrary of the allegation made by him. This is what he stated at para. 4:

Pursuant to the said raids, I appointed HRM (Tax Services) Sdn. Bhd. as my tax agent and **subsequently my tax agent had meeting and exchanged correspondence with the officers from the respondent's department in order to sort our my tax matters. (emphasis added)** *h*

The correspondence, exhs. HZS-1, HZS-2, and HZS-3 annexed to the affidavit of the applicant would further lend support that the applicant was given all the opportunities to put up his case for the consideration of the respondent. In that even, the allegation regarding natural justice has no basis whatsoever and is in fact to the contrary. *i*

a In respect of ground (b) the respondent has the power under s. 91(1) of the Income Tax Act 1967 to make an assessment or additional assessment according to the best of his judgment. The guideline to the best judgment assessment is to be found in the Privy Council case of *Commissioner of Income Tax, Central & United Province v. Laxminarain Badridas* [1937] 5 ATR 170 which was quoted in the Supreme Court case of *Government of Malaysia & Anor. v. Jagdis Singh* [1987] CLJ (Rep) 110 at p. 118 as follows:

b The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous return by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense, too, the assessment must be to some extent arbitrary.

c In my view, to allege that the respondent has not take out he into account relevant matters, is merely a conjecture and speculative on the part of the applicant. It is a matter for the applicant to provide the documentary evidence for the consideration and the best judgment assessment of the respondent. In this respect it would seem that the applicant had not been responsive to the respondent's queries as can be seen from para. 2 exh. HZS-7 and I quote:

Harap ambil perhatian bahawa tafsiran bahan (perlindungan) telah dibuat dan dikeluarkan berikutan kegagalan pihak tuan memberikan jawapan kepada surat saya bertarikh 30 Mac 1989 walaupun beberapa peringatan telah dikeluarkan.

e In my view, if there are merits in the applicant's case and the respondent has erred in the additional assessment, the true amount should be determined on appeal. The onus of proving to the Special Commissioner that the additional assessments are excessive of erroneous lies on the applicant vide para. 13 of Schedule 5 to the Income Tax Act (see p. 118 of the *Government of Malaysia & Anor. v. Jagdis Singh*)

f The learned Counsel for the applicant relied on the then Federal Court case of *Lai Cheng Cheong v. Sowaratnam* [1983] CLJ (Rep) 216 in support of his contention that he was not obliged to have exhausted his right of appeal within the administrative hierarchy nor need he have exhausted his right of appeal to a Court of law in seeking for an order of *certiorari*. *Lai Cheng Cheong's* case was considered by the Supreme Court in *Government of Malaysia & Anor. v. Jagdis Singh* and this is what the Supreme Court said at p. 113:

g But most probably the Federal Court relied on the challenge of jurisdiction as the basis for the exceptional treatment of the application. This would seem to be indicated by the reference made to the speech of Lord Pearce dealing with general jurisdiction of the Courts in the administration of justice in *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147. Therefore in *Sowaratnam* although the application before the Court was only for leave and an in-depth study of the statement was not really warranted, the principle followed was the same as stated in *Regina v. Special Commissioners of Income Tax (ex parte Moorey)* [1972] 49 TC 71 by Lord Widgery CJ in his judgment at pp. 72-73:

h On the other hand, when there is an alternative and convenient from of appeal, it is normally the practice of this Court to interfere **unless the allegation of want of not jurisdiction or breach of the rules of natural justice is a clear and simple case in which it is evidence that to come here rather than pursue the more traditional lines of appeal is going in result in a saving of time or expense.** (emphasis added)

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At p. 115, of *Government of Malaysia & Anor. v. Jagdis Singh* the Supreme Court stated thus:

A clear principles is reiterated here i.e. it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the Court but where there is another avenue or remedy open to the applicant **it will only be exercised in every exceptional circumstances.**

In *Re Preston* was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. **But what was also made clear is that remedy by way of judicial review is not available where an alternative remedy exists except in very exceptional circumstances.**

In answer to the first question we would therefore hold that the discretion is still with the Courts but where there is an appeal provision available to the applicant, certiorari should not normally issue **unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.** (emphasis added)

It would seem clear to me from the statement filed together with the affidavits in support and the documents exhibited thereto (apart from the affidavit of TAR regarding the funds being political in nature which is a matter for evidence to be adduced to the satisfaction of the respondent) the applicant has not shown lack of jurisdiction or a blatant failure to perform some statutory duty or a serious breach of the principles of natural justice on the part of the respondent to merit the Court to exercise its discretion by granting the leave sought by him. For the reasons set out by me, I was of the view that the application was frivolous or vexatious and that there was no substance in the grounds supporting the application the motion was dismissed with costs to be taxed unless agreed.

Also found at [1991] 1 CLJ 746

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